In order to ensure fair compensation, and a uniform charge for the use of the payphone the Commission should prescribe a uniform maximum nationwide rate of 40 cents for local coin calls. This is the same per-call rate that the Commission found appropriate in its original payphone compensation decision setting flat-rate compensation for interstate access code calls. Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Second Report and Order, 7 FCC Rcd 3251 (1992). The same uniform 40-cent rate would be prescribed for compensation for all coinless calls. See Section II E below. With respect to coin calls, the 40-cent rate would affect only local calls and only the initial three-minute increment of the call. All other coin rates would be unaffected under this proposal.[17]

4. 0+ Calls Routed to the Presubscribed OSP (¶ 16)

The Commission tentatively concludes that compensation should not be prescribed for "0+" calls "because competition in this area ensures 'fair' competition for PSPs." However, rate ceilings in many states prevent the marketplace from ensuring that payphone service providers are fairly compensated for intrastate "0+" calls. APCC data indicate that a much larger share of "0+" calls is intrastate than interstate, and a larger share is intraLATA (including local) than interLATA. Further, because LEC payphones are not generally required to recover their own costs, these existing 0+ rate ceilings do not generally include a payphone element to ensure

[17] There is less need for a uniform nationwide rate in the case of long distance calls paid for by coin because callers generally expect to pay varying amounts based on the distance and duration of the call.

compensation for the use of the payphone.[18] Where such rate ceilings apply, payphone service providers are not assured of a fair contribution to equipment costs on 0+ calls.

Commission payments from OSPs on such calls cannot be viewed as providing fair compensation to payphone service providers' costs. Those payments are for the value to the IXC of receiving presubscribed traffic from the location. Such commission payments, which are generally comparable whether paid to PSPs or directly to location providers, do not address the need for compensation for use of the payphone, an element that is separate and distinct from payments for delivery of presubscribed traffic.[19]

Thus, it is not correct that 0+ commission payments automatically can be assumed to "fairly compensate" payphone service providers for the use of payphones. The Commission,

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[18] There are a few exceptions, such as in California and Florida, where a set use fee or "pay station service charge" is collected on 0+ intraLATA (but not interLATA) calls placed from payphones.

[19] The Notice appears to assume that, due to the MFJ restrictions, comparable commission payments are not currently paid for 0+ traffic from Bell payphones. Notice, ¶ 16, n. 53. On intraLATA 0+ calls, of course, the MFJ did not restrict in any way the payment of commissions by Bell companies for delivery of traffic. Even on 0+ interLATA calls, where MFJ restrictions applied, OSPs simply pay commissions directly to the location provider rather than to the Bell company's payphone division. The BOC payphone operations are the beneficiaries of commission payments made to location providers because those commission payments are the equivalent of the commission payments the location provider could obtain by dealing with an IPP provider. Indeed, a market has developed for location "agents" to aggregate traffic from numerous Bell payphone location providers. An OSP typically offers commissions comparable to those offered to IPPs to Bell company location providers or location "agents" Thus, commissions received by IPP providers on 0+ calls are, at best, only sufficient to enable IPP providers to maintain parity in competition for locations. They do not include an element to compensate for the cost of the payphone and its maintenance. Indeed, the fact that location providers with Bell payphones and location agents can obtain commission levels comparable to IPP providers shows that these commissions do not contain a "payphone compensation element," since Bell location providers location agents incur no payphone expense; all payphone expenses are paid for by the BOC.

which has an affirmative obligation to ensure that PSPs are fairly compensated, cannot rely on the relationship between presubscribed OSPs and PSPs to provide compensation for 0+ calls.[20]

The simplest and most effective approach to ensuring that payphone service providers are "fairly compensated for each and every intrastate and interstate call" is to determine a fair level of compensation and mandate that payphone service providers be compensated at least that amount for all calls. PSPs should derive payment for the service they provide by placing payphones through compensation by carriers directly for that service The Commission should break the link between payphone compensation and indirect, or "implicit", cost recovery through the long distance rates paid by end users. As discussed above, the Commission is well familiar with the result of relying on OSP charges as the recovery vehicle for the separate service of providing a payphone. Indeed, the Commission is seeking to address some of those consequences in an NPRM released simultaneously with the instant one Rather than leaving intact a system whose consequences the Commission is trying to ameliorate in a separate proceeding, the Commission should break the link between long distance rates and fair compensation for PSPs by directly requiring per call compensation on all calls, including 0+

5. <u>"Dial Around" (Access Code and Subscriber 800 Calls)</u>

In the case of access code and Subscriber 800 calls, as the <u>Notice</u> recognizes, there can be little dispute about the need for the Commission to prescribe fair compensation. Access code compensation is interstate-only in most jurisdictions, and even the interstate compensation has not

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20 On the other hand, to the extent presubscribed OSPs have already included a "payphone compensation element" in the commissions to IPP providers the market and the interplay between OSPs and IPP providers can be relied upon to push the commission level down to squeeze out any payphone compensation element.

kept pace with the increase in access code traffic brought about by heavy carrier promotion of existing access codes and new call patterns, such as 1-800-COLLECT.

Subscriber 800 calls, of course, are not compensated at all at the interstate level, or, with only one exception, at the intrastate level. As noted above, subscriber 800 calls constitute about 50% of all coinless calls.

6. Local Directory Assistance Calls

The Commission's Notice recognizes that local directory assistance (411) calls form a significant category of calls, but fails to make a specific proposal for fairly compensating payphone service providers for these calls.

IPP providers are subject to varying charges and regulations for DA and generally cannot recover any contribution to reflect the use of the payphone. At present, LEC public payphones in many jurisdictions do not charge the caller for "411" local directory assistance (DA) calls made from LEC public payphones. However, LECs generally do charge IPP providers for the DA service on DA calls made from IPPs.[21] In some jurisdictions, IPP providers are allowed to charge the caller a coin deposit for DA calls. In other jurisdictions, they are prohibited from doing so, even though they may incur a charge by the LEC. Even where IPP providers are allowed to charge a coin deposit for local DA, the charge generally may not exceed the LEC's charge for the service. Thus, there is no contribution to reflect the use of the payphone.

[21] Pursuant to Section 276(a)(2) and 276(b)(1)(B) and (C), LECs should no longer be able to discriminate in the application of charges for local DA to IPP providers and to their own payphone divisions. The same DA charge (or no DA charge) must apply to both types of payphones or neither one

Under Section 276(b)(1)(A), the Commission must ensure that, under this new regime, IPP provider and LEC payphone operations are fairly compensated when their payphones are used to make DA calls. The Commission should authorize all payphone service providers to charge a coin deposit for local DA calls that enables them to recover the amount they are charged by the LEC for local DA plus an additional contribution to maintaining the payphone. This additional contribution should be the same 40-cent element that APCC is urging the Commission to prescribe for other types of calls.

B. Entities Required to Pay Compensation (¶¶ 24-28)

APCC agrees with the Commission's tentative conclusion that a coin deposit mechanism is the least appealing of alternative methods for collecting compensation on currently "coinless" calls. A coin deposit method would violate consumer expectations, and would be highly inconvenient for consumers.

The Commission also tentatively concludes that a "carrier-pays" payment mechanism, in which recovery of payphone compensation from end users is up to the carrier, is preferable to a "set use fee" payment mechanism, in which the compensation payment must be collected from the subscriber. APCC believes that, in principle, a "set use fee" would most effectively implement the Commission's policy of placing costs on the cost causer. Furthermore, as a conceptual matter, the "set use fee" appropriately captures the concept that Section 276 compensation is intended to support the use of a payphone, which is separate and distinct from, and not included in, tariffed operator service and transmission elements of carrier services.

At the same time, APCC understands the Commission's concern about avoiding unnecessary imposition of "transaction" or administrative costs on carriers.[22] As stated above, APCC believes that the Commission should prescribe uniform compensation applicable to all calls.[23] However, to the extent that a carrier prefers to recover the charge in some manner other than a direct pass-through to the end user, APCC would not object to a Commission ruling allowing carrier discretion in recovery of the charge.

In any event, all types of carriers should be included among the carriers that are required to pay. Clearly, since the compensation will be paid pursuant to Section 276 rather than Section 226, there is no longer any need to limit payment obligations to carriers that meet the Section 226 definition of a "provider of operator services." Further, since compensation is payable on all calls, including intraLATA or local calls, there is no longer a need to limit compensation obligations to "interexchange carriers." Any carrier that handles a coinless call from a payphone, including a LEC, should be required to pay the compensation amount

On access code calls, the carrier at whose call-processing "platform" the call is handled should pay the compensation for the call. On subscriber 800 calls, the carrier to which the call is to be routed according to the 800 data base should pay the compensation. In some cases, there may be ambiguity as to whether a call is appropriately classified as an "access code" call or a

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[22] As discussed in the Comments of California Payphone Association ("CPA"), carriers such as AT&T, Pacific Bell, and GTE have incurred rather modest "transaction" costs in implementing that state's "pay station service charge," which is collected from end users. Claims by MCI and Sprint of exorbitant processing costs for that charge are not credible in light of the experience of other carriers.

[23] As stated above, whichever method is chosen, we believe the prescribed compensation should be collected by the IPP provider on all calls, and should not be counted in determining whether any rate ceiling has been exceeded.

"subscriber 800" call. For example, "debit cards" are an increasingly popular means of placing long distance calls from payphones. As the name implies, debit cards are purchased for cash at various retail outlets and can be used to place calls until the value of the card has been exhausted. The debit card user dials an 800 number similar to an access code in order to access a call-processing platform, where the user inputs a PIN number and dials the digits to complete the call.

Thus, the debit card call is in a number of ways similar to an access code call. However, the number of companies issuing debit cards is very large, and most of these companies are quite small. Therefore, administration of per-call payments from each debit card issuer is likely to be expensive in relation to the amount.

A simple and reasonable way to handle debit card calls for purposes of Sectoin 276 compensation would be to classify debit card access numbers as a subscriber 800 number. The call would be treated as "complete" when it reaches the debit card issuer's platform, and compensation for the call to the IPP provider would be paid by the carrier providing the underlying 800 service, not by the debit card issuer In a carrier-pays environment, it would be up to the 800 carrier to decide how it wanted to handle this cost.

C. <u>Ability of Carriers to Track Calls from Payphones</u> (¶¶ 29-31)

Under the existing per-call compensation waivers and intrastate per-call compensation schemes -- including Illinois' compensation system which includes subscriber 800 calls -- the carriers that pay compensation are responsible for tracking the calls. In addition to AT&T and Sprint, which are already paying interstate access code compensation on a per-call basis, MCI (after denying for years that it had the capability to track calls), recently announced that it, too, is able to pay compensation on a per-call basis. Comments of MCI, CC Docket No. 91-35, filed October 10, 1995, at 4. APCC believes this approach should be carried through in the coinless call compensation scheme established under Section 276 Carriers should continue to be responsible for tracking calls.

However, in order to ensure that calls are being accurately tracked, carriers should be required to undergo an annual independent audit of their per-call tracking functions. Carriers also should be required to allow testing of their tracking systems LEC call tracking data and against call detail records (referred to as "SMDR") that can be generated by "smart" payphones. Finally, the Commission should require carriers to report their total monthly traffic volumes and average payments per payphone in the various coinless call categories in order to compile data for use in supervising and making adjustments to the compensation scheme.

Additional forms of tracking may become available to be used as a check on carriers' tracking. Some Bell companies have acknowledged that they are able to track, in their network, interLATA calls originating from payphones. In the Matter of Ameritech Operating Companies Petition for Waiver of Part 69 of the Commission's Rules to Restructure Its Rates to Establish a Pay Telephone Use Fee Rate Element; Southwestern Bell Telephone Company Petition for Waiver of Part 69 of the Commission's Rules to Restructure Its Rates to Establish a Pay Telephone Use Fee Rate Element, Order, DA 96-268 (released March 1, 1996) at para. 27 ("Ameritech/SW Bell Waiver"), application for review and motion for stay pending. Bell companies and other large LECs that provide network tracking for their own payphones should make those tracking services available to IPP providers at the same rates, terms and conditions.

For carriers that, because of their small size, are unable to track access code calls, the Commission should require such carriers to pay flat-rate compensation based on their estimated percentage of access code calls. APCC has collected extensive data on the number of calls placed using hundreds of commonly used carrier access codes. A list of the access codes that APCC is tracking is attached, along with the relative percentages of recorded access code traffic for the five largest carriers. Additional data on smaller carrier percentages of access code traffic will be submitted by APCC with its reply comments.

For carriers that are too small to track subscriber 800 traffic, the Commission should require such carriers to pay flat-rate subscriber 800 compensation based on their percentage of toll revenue or (if available) their percentage of overall payphone and non-payphone 800 service traffic.[24] A carrier's subscriber 800 payment would be computed by dividing its market share percentage by the combined share of those carriers that pay on a per-call basis. The resulting ratio would then be applied to the combined average payphone subscriber 800 traffic volume reported by those carriers that pay on a per-call basis. For example, suppose carrier X has a 1% share of the 800 service market, and all the carriers paying on a per-call basis have a combined 96% share of the 800 service market. Carrier X would pay compensation based on 1/96 of the per-call carriers' total compensation payments. If total subscriber 800 payments averaged $32.00 per payphone per month, then Carrier X would pay each payphone owner a flat-rate payment of 1/96 of $32.00, or $.33 per payphone per month.

[24] APCC has been collecting data on the total calls to subscriber 800 numbers per payphone per month. However, APCC has no way of identifying the percentage of those calls handled by various carriers.

D. Administration of Per-Call Compensation(¶¶ 32-34)

Since Bell payphones will no longer be part of the Bell Company's regulated local exchange services, it would be inappropriate to allow Bell Companies to collect payphone compensation pursuant to their access charge tariffs, as Ameritech and Southwestern Bell are currently authorized to do pursuant to their waivers. See Ameritech/SW Bell Waiver. Bell companies should collect compensation in the same way as IPP providers.

There have been longstanding concerns under the current IPP compensation system (both flat-rate and per-call) with respect to the issue of automatic number identifier ("ANI") verification. Under the current system, LECs are required to provide IXCs with verification that ANIs claimed by IPPs in their invoices to IXCs are in fact ANIs subscribed to the LEC's "COCOT" or IPP service. There continues to be a large number of ANIs disputed between IPP providers, on the one hand, and the major IXCs on the other. These disputes arise in large part from discrepancies between the ANIs listed by the LECs in their communications to IXCs, on the one hand, and the ANIs claimed by IPP providers. Some LECs fail to provide any ANI lists for a given quarter, while others provide lists only after a long delay. The result is that IXCs dispute all ANIs submitted by IPP providers that are associated with those LECs. In other instances, IPP providers succeed in having their LECs correct some of the disputed ANIs for a given quarter, only to have the same disputes recur the following quarter.

APCC generally agrees with the ANI verification guidelines suggested by the Commission. It is especially important to ensure that LECs have an incentive to provide accurate and timely verification of ANIs of IPP providers. While LECs obviously will have an adequate incentive to accurately identify their own payphone divisions' ANIs to compensating carriers, as discussed above this has not been the case with respect to IPP providers' ANIs. Yet, IPP providers should not be penalized if LECs with competing payphone operations fail to provide verification information. Thus, APCC strongly supports the guideline providing that once a LEC makes a positive identification of an IPP as having been installed, the IXC must accept claims for that payphone's ANI until such time as the LEC provides affirmative information that the payphone has been disconnected. If a LEC fails to provide either positive or negative verification of a claimed IPP provider ANI, the IXC must pay compensation on that ANI [25]

Given the inherent potential for LEC discrimination in ANI verification between its own payphones and IPPs, it is entirely appropriate for the Commission to apply different ANI verification guidelines to the two classes of payphones. Indeed, LECs must be given an additional incentive to prevent discrimination between LEC payphones and IPPs in the timeliness and accuracy of ANI reporting. If LECs fail to accurately identify an IPP ANI, and the IPP provider proves that the ANI is valid, the LEC should be required to match each IXC's compensation payment for that ANI for the relevant period.

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[25] Another issue that has given rise to disputes regarding per-call compensation concerns a carrier's obligation to pay on a per-call basis during a period when a payphone is taken out of service. The flat-rate compensation rule implies that a payphone is entitled to compensation if it is in operation in the last day of the compensation period. Literal application of this approach to per-call compensation would mean that a payphone that is disconnected on June 1 (for example) is not entitled to compensation for any part of the period March 1 - June 30, even though it originated traffic for carrier throughout April and May. Meanwhile, a payphone that is installed on June 1 will be compensated only during that portion of the compensation period when it is actually delivering calls (i.e., during the month of June). In other words, a payphone that is installed during a compensation period is compensated only for the post-installation portion of that period, while a payphone that is disconnected is not compensated for any portion of the period. To avoid this asymmetrical and inequitable result, the rules should provide that when a payphone is disconnected, the payphone should be paid for the pre-disconnection portion of the period when it is still generating traffic, even though the payphone ANI will not appear on LEC lists compiled at the end of the period.

It is also important to have a uniform alternative method of verifying ANIs. In its September 8, 1995 Reconsideration Order the Commission ruled that in the event that LECs fail to list a payphone ANI, an IPP provider provides adequate alternative verification if it submits to the compensating carrier an affidavit accompanied by a telephone bill. Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Memorandum Opinion and Order on Further Reconsideration and Second further Notice of Proposed Rulemaking, 10 FCC Rcd 11457, 11459 (1995). The only difficulty with this method is that LEC telephone bills do not always indicate clearly whether the bill is for "COCOT" service or the equivalent. The FCC should amend its rules to require LECs to state on each bill to a PSP that the bill is for payphone service.

IXCs should be able to refuse payment for compensation claims that are submitted years after they were due. However, IXCs should not refuse payment on timeliness grounds for ANIs submitted by a payphone provider up to one year after the end of the period in question. Further, the submission of a claim by an IPP provider tolls any limitation period for bringing a complaint to the Commission until such time as the IXC issues a final denial of the claim.

Finally, if payment is not made by IXC or its agent to a payphone provider or its agent within 90 days of the close of a period, reasonable interest and late charges should apply. In many cases, IXCs have consistently delayed payment for weeks, months and even quarters, without fear of incurring any penalty. A penalty should be provided for, as it would be in a typical arm's-length commercial transaction.

E. Per-Call Compensation Amount (¶¶ 35-38)

If compensation is prescribed for all calls, the level of compensation should be prescribed at a level of 40 cents per call. If compensation is not prescribed for all calls -- and particularly if the Commission fails to ensure that payphone service providers receive that amount for local coin calls -- the Commission must prescribe a substantially higher rate of compensation for coinless calls -- in the neighborhood of 80 cents per call.

The compensation level that was the basis for the Commission's flat-rate prescription was 40 cents per call. This amount was prescribed based on a number of factors, including market-based surrogates. Such market-based methods are entirely appropriate as a means of ensuring that payphone service providers are "fairly compensated for each and every . . . call." Other statutory schemes for "fair" compensation have been implemented by looking at market rates for comparable services. For example, the federal statute governing medical and dental care for dependents of military personnel requires the Secretary of Defense to "prescribe fair charges for inpatient medical and dental care given to dependents ." 10 U.S.C.A. § 1078(a). The Secretary's implementing regulations prescribe a scheme of charges based on "adjusted standardized amounts" and "weighting factors specific to each DRG [diagnostic related group]." 32 CFR § 199.14. These amounts are calculated based on actual medical provider charges for various DRGs, adjusted by means of certain derived average cost factors. Id. Similarly, the Commission may consider market price data in prescribing fair compensation for payphone calls under Section 276.

The market-related surrogates that led the Commission to prescribe compensation at 40 cents per call in 1992 are at the same or higher levels today

For example, the Commission's 1992 decision considered as one factor the range of AT&T commission payments to IPP providers for 0+ traffic. APCC has reviewed data on some 150,000 payphones that are contracted to AT&T Call revenue from around 4 million 0+ calls originating from those payphones during recent periods averaged about $2.09 per call. Commission percentages for these calls range from around 22% at the low end to 30% at the high end, with the largest IPP providers and 0+ aggregators commanding percentages substantially higher than 30%. Thus, the range of AT&T commission levels runs from around 45 cents to around 80 cents on an average call.

A second factor considered by the FCC was operator transfer rates charged by various LECs. At the time of the Second Report and Order, these rates ranged from $.22 per call to $.46 per call. Second Report and Order, 7 FCC Rcd at 3256 Today, the lower bound of that range has increased to $.28, while the upper bound remains about the same.[26] Together, these surrogates support a compensation level that at least equals the 40-cents level utilized in the Second Report and Order.

Other surrogates are also relevant. For example, AT&T charges a coin service charge (in addition to its per-minute rate) for "sent-paid" toll calls placed from payphones. Sample tariffs compiled by APCC indicated that, depending on the jurisdiction, these sent-paid coin service charges range from a low of 75¢ to a high of $1 95. This range provides an indication of the market value that consumers are willing to pay to use a payphone to make a toll call. In the event that the Commission decides not to prescribe a uniform charge for local coin calls, the range of

[26] Ameritech and Bell Atlantic, which charged $.22 in 1993 now charge $.28. The National Exchange Carrier Association, which previosuly charged $.45, now charges $.46.

coin calling surcharges provides an appropriate "range of reasonableness" for compensation on coinless calls.

These surrogates support a range of potentially "fair" compensation rates. A compensation rate of 40 cents per call is consistent with the rates supported by credible ratemaking data currently in the record in Docket No. 91-35. As previously discussed in the filings of APCC and the Illinois Public Telecommunications Association ("IPTA"), the Illinois Commerce Commission recently found that Ameritech's cost per call was 36 cents, and prescribed an intrastate dial-around compensation rate of 30 cents per call.[27] IPTA itself submitted data showing that IPP provider costs average between 37 cents and 55 cents per call, and that a market-based methodology would justify rates ranging from 42 cents per call to 95 cents per call.[28]

Although 40 cents is an appropriate compensation rate if applied as a uniform charge for all payphone calls, in the event that the Commission does not prescribe a uniform compensation rate that applies to local coin calls, the Commission must prescribe a higher compensation rate for coinless calls in order to take account of undercompensating local coin rates. It is well established that regulatory commissions may not close their eyes to the interdependency of interstate and intrastate rates. Conway Corp. v. Federal Power Commission, 510 F.2d 1264 (D.C. Cir. 1975), aff'd 426 U.S. 271 (1976). Where, as here, the Commission has an affirmative duty to ensure fair compensation for all calls, the Conway principle applies even more strongly. Assuming that the

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[27] This rate applies both to access code calls and subscriber 800 calls. See AAA Coin-Phones & Systems, Inc., et al. v. AT&T, et al., Complaint for Just and Reasonable Compensation for Billable Operator, 800, 900 and 700 Service Calls, Illinois Commerce Commission, Docket No. 92-0400, Order, issued October 3, 1995.

[28] Under some approaches, IXCs and/or LECs may incur some billing and collection expenses. The compensation amount we discuss above is a net amount, after such expenses.

Commission could lawfully decline to prescribe fair compensation for local coin calls, it would be a legal error for the Commission to refuse to take account of its failure to address fair compensation for local coin calls when prescribing compensation for other classes of calls. If the FCC's prescribed compensation does not apply to the local coin rate, the compensation rate must be set at the higher end of the range, i.e., at least 80 cents per call

Finally, in order to minimize the need to revisit the compensation rate in the future, whatever rate is prescribed should be "indexed" so that, as the Consumer Price Index changes, the local coin rate changes at the same rate (rounded to the nearest nickel).

F. Interim Compensation (¶¶ 39-40)

The Commission should provide interim compensation to independent public payphone ("IPP") providers for currently uncompensated calls, pending implementation of the comprehensive scheme mandated by Section 276 Under the current system of regulation, LEC payphone operations are able to receive full compensation for their payphones from regulated interstate or intrastate exchange or exchange access revenue By contrast, the existing IPP compensation provides compensation for only a small percentage of the calls for which compensation is needed and mandated by Section 276 Currently, IPP providers are totally uncompensated for the majority of coinless calls made from their payphones. For access code calls, IPP providers are currently compensated for only a portion of the calls pursuant to the interstate access code compensation scheme, and intrastate compensation regulations adopted in a very few states. In most states, no compensation at all has been prescribed for intrastate access code calls. Moreover, for subscriber 800 calls, which data indicate currently accounts for roughly half of coinless calls, IPP providers receive no compensation at all, at the interstate level or, in virtually all cases, at the intrastate level.

The Commission was originally asked to consider prescribing compensation for IPP providers for subscriber 800 calls in the TOCSIA compensation proceeding in 1991, but concluded that it lacked authority to prescribe such compensation The Court of Appeals reversed that decision, finding that compensation for subscriber 800 calls was within the scope of the compensation proceeding the Commission was required to conduct under TOCSIA in 1991.[29] Therefore, the court remanded the issue with instructions to consider the need to prescribe compensation for IPP providers for such calls While Congress has now enacted a broader requirement for all payphone service providers to be fairly compensated on all calls, such compensation is not yet in place. Meanwhile, it has now been more than one year since the Court of Appeals directed the Commission to reconsider this issue, and more than five-and-a-half years since Congress originally directed the Commission to consider the need for payphone compensation.

During this period when IPP providers have not been compensated, the volume of calling to subscriber 800 numbers has rapidly increased, as the Commission noted in the Notice and in last year's Notice of Proposed Rulemaking to consider to address the depletion in the supply of 800 numbers.[30] This extraordinary growth in usage of 800 numbers has caused IPP providers to incur more and more uncompensated use of their payphones, and has allowed interexchange

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[29] See Florida Public Telecommunications Association v. FCC, 54 F.3d 857 (D.C. Cir. 1995) ("FPTA").

[30] See In the Matter of Toll Free Service Access Codes, Notice of Proposed Rulemaking, CC Docket No. 95-155, FCC No. 95-419 (released October 6, 1995) at ¶¶ 1-3.

carriers ("IXCs") to benefit from receiving more and more traffic from IPPs without payment for such use of payphones.

IPP providers should not continue to go uncompensated for the use of their payphones to originate subscriber 800 calls and other currently uncompensated calls. While the Act requires the Commission to establish a permanent compensation scheme that ensures that all payphone service providers are compensated for all calls, that compensation scheme is unlikely to be implemented for at least four months. 47 U.S.C. § 276(b)(1) (providing for regulations to be finalized by early November). Moreover, unforeseen difficulties in implementation could prevent a permanent, comprehensive compensation scheme from taking effect immediately upon adoption.

Therefore, the Commission should prescribe interim compensation for IPP providers for currently uncompensated calls originating from their payphones. Such interim compensation will ensure immediate compliance with the court of appeals mandate in FPTA, so as to implement as quickly as possible the long deferred mandate of Congress under TOCSIA. In addition, such compensation will expedite implementation of Congress' Telecommunications Act mandate "to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone ...", as well as implementation of the Congressional intent underlying Section 276 that all discrimination between LEC payphones and IPPs be eliminated.[31]

Interim subscriber 800 compensation should be prescribed on the basis of 40 cents per call. If carriers cannot immediately pay such compensation on a per-call basis (although they are

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31 S. Rep. No. 104-458, 104th Cong., 2d Sess. 158 (1996).

doing so in Illinois), APCC proposes that interim compensation be based on a flat rate similar to flat-rate access code compensation.

Under this approach, each IPP provider would receive equal flat-rate per phone per month payments, based on 40 cents per call times the average number of subscriber 800 calls. Attachment 1 shows the average numbers of subscriber 800 calls per phone per month placed from samples comprising 2,000 - 4,000 payphones during the months of March - May 1996. These data show an average of about 100 subscriber 800 ("unmatched") calls per phone per month. Therefore, interim subscriber 800 compensation should be prescribed at a level of $40 per payphone per month.

Each carrier's share of this total would be based on its share of toll revenues (or its share of 800 revenues, if a reliable source of such data exists).[32] For purposes of determining which carriers should be subject to interim compensation obligations, the Commission should use the same $100 million cut-off that currently applies to flat-rate access code compensation. The only difference is that, in the case of subscriber 800 calls, Bell companies and other large LECs are substantial participants in the market. Therefore, the obligation to pay interim subscriber 800 compensation should not be limited to interLATA carriers.

In addition to interim compensation for subscriber 800 calls, the Commission should prescribe an interim revision of the existing compensation for access code calls to reflect the increased number of access code calls and the Commission's expanded jurisdiction over such calls.

[32] This scheme may also be an alternative to per-call tracking under the permanent compensation rule.

Since AT&T, MCI and Sprint all acknowledge that they can pay compensation for access code calls on a per-call basis, those companies should all pay access code compensation on a per-call basis for all interstate and intrastate calls, just as AT&T is doing today.[33] However, the rate should be prescribed on an interim basis at 40 cents per call. Other carriers would pay access code compensation on a flat-rate basis based on the current level of access code calling, which is 40 calls per month. Carriers below the top three would pay based on (1) their current percentages of access code calls (see attached data) or (2) their current percentages of toll revenues (as under the current formula for access code compensation)

It is particularly important for MCI to begin paying compensation on a basis that reflects its actual share of access code calling. Until recently MCI professed an inability (unique among the top 3 carriers) to track access code calls. MCI recently acknowledged that it <u>can</u> track access code calls, but nevertheless has been allowed to continue to pay flat-rate compensation that greatly understates its actual share of access code calling, which APCC's data indicate is about 33%. In addition, by continuing to pay flat-rate compensation MCI is avoiding its obligation to compensate IPP providers for the higher overall volume of access code calls. Therefore, for purposes of interim compensation, MCI should be given a choice. The first alternative is to begin paying per-call compensation on all calls, on the same basis as AT&T and Sprint. The second alternative is to continue paying flat-rate compensation, but at a level based on sample data indicating the actual number of access code calls delivered to MCI from sample payphones. According

[33] Sprint is currently paying per-call access code compensation for interstate calls, but is paying such compensation for intrastate calls only in those few states that have ordered per call access code compensation.

to APCC's payphone sample data, this level should be 33% of 40 calls, or about 13 calls x 40¢ = $5.20 per month.

APCC urges the Commission to make interim compensation effective as of the date of the Notice. IPP providers have been providing the use of their payphones to make subscriber 800 calls for more than a decade, while receiving no compensation whatsoever. As discussed above, APCC first officially requested such compensation in 1990. In 1991, the Commission ruled that equity requires payment of compensation for the use of IPPs, but believed that it lacked authority under the Telephone Operator Consumer Services Act of 1990 to order subscriber 800 compensation. Subsequently, in FPTA, the Court of Appeals overruled the FCC on this point. Thus, it has been apparent for the last five years that IPP providers were entitled to such compensation, and the only reason they have not received the compensation is because of a legal error of statutory interpretation. Carriers clearly have been on notice that they are not entitled to a free ride.

Further, the Telecommunications Act of 1996 unequivocally mandates the payment of compensation for subscriber 800 calls. In this regard, the federal statute is similar to the Illinois payphone compensation statute, which has been found to apply retroactively to calls that were clearly compensable under the statute. In relevant part, the Illinois statute provided that:

> Any telecommunications carrier using the facilities or services of a payphone provider shall pay the provider just and reasonable compensation for the use of those facilities or services to complete billable operator services calls and for any other use that the Commission determines appropriate consistent with the provisions of this Act. The compensation shall be determined by the Commission subject to the provisions of this Act.

Ill. Public Utilities Act, § 13-510. In 1995 the Illinois Commerce Commission prescribed compensation for access code calls both prospectively and retroactively to May 14, 1992, the date of enactment of the statute. The ICC reasoned that the carriers "had an obligation as of May 14, 1992, to compensate [IPP providers] for the use of their facilities or services for billable operator services." AAA Coin-Phones & Systems, et al. vs. AT&T Co., Order, Docket No. 92-0400, issued October 5, 1995, at 21. The Commission added:

> Each of the Respondents to this proceeding knew or should have known, that as of May 14, 1992, a payphone provider which provided services or facilities to complete a billable operator service call was entitled to compensation from the OSP. Such a requirement was distinctly set forth in Section 13-510.

Id. at 22. The Commission found that subscriber 800 calls were not retroactively compensable because they were not "billable operator services calls" for which compensation was expressly mandated by the statute.

Section 276 similarly places carriers on notice that IPP providers are entitled to fair compensation for calls placed from their payphones. Unlike the Illinois statute, however, Section 276 clearly mandates that IPP providers be compensated for subscriber 800 calls as well as access code calls. The legislative history further clarifies that both subscriber 800 and access code calls are included in the statutory mandate. See S. Rep. No. 458, 104th Cong., 2d Sess. 158 (1996) (compensation to include "for example, 'toll-free' calls to subscribers to 800 and new 888 services"). Even more than Illinois' compensation statute, Section 276 establishes an indisputable right of IPP providers to compensation and warrants the payment of compensation at least as of the date that the FCC's Notice yet again put carriers on notice of their compensation obligations.

III. RECLASSIFICATION OF LEC PAYPHONES AND NONSTRUCTURAL SAFEGUARDS (¶¶ 41-66)

Regarding these issues, APCC adopts the views set forth in the comments of the Georgia Public Communications Association.

IV. SELECTION OF INTERLATA CARRIERS SERVING BELL COMPANY PAYPHONES

There are a number of concerns that must be addressed before the RBOCs can be granted authority to negotiate with location providers, and subject to the terms of any agreement with the location providers, to select and contract with the carriers that carry interLATA calls from their payphones. 47 U.S.C. § 276(b)(1)(D).

In the "Motion to Vacate" the 1982 AT&T Consent Decree, filed by Bell Atlantic, Bell-South, NYNEX, and Southwestern Bell in United States v. Western Electric Co., Civ. Act. No. 82-0192, July 6, 1994, the Bell companies presented data indicating that the Bell companies retain more than 85% of the installed base in their respective territories. According to the Bell companies' data, after eight years of competition, the best that IPP providers could do is gain a mere 13.5% share of the payphone market. The Bell Companies remain overwhelmingly dominant in the payphone sector,[34] and each is overwhelmingly dominant within its own region, dwarfing its nearest competitor(s).

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[34] Indeed, by ordinary antitrust criteria, the Bell Companies would be considered to monopolize the payphone market in their respective territories. P. Areeda & D.F. Turner, Antitrust Law: An Analysis of Antitrust Principles and Their Application, ¶ 804 (1978) (75% is a "reasonable benchmark figure" supporting a presumption of substantial market power, i.e., monopoly power). See also Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S. Ct. 2072, 2090 (1992) (80-95% of market with no readily available substitutes sufficient for monopolization claim to withstand summary judgment); Broadway Delivery Corp. v. United Parcel Serv., 651 F.2d 122 (2d Cir.), cert. denied, 454 U.S. 968 (1981) (50%); Pacific Coast

If the Bell companies are authorized to select the interLATA carriers serving their payphones, steps must be taken to prevent them from demanding supracompetitive commission levels from carriers, which in turn will enable them to increase to an even greater extent their dominance of the payphone market. In the 0+ payphone presubscription submarket, the commission payment that any entity can command depends in large part on the amount of traffic that the entity can deliver to a carrier. A Bell company that has the right to directly presubscribe its payphones would be able to demand commission levels well in excess of those obtainable by IPP providers even if all the IPP providers in a particular area "aggregated" their payphones.[35] The high commission levels thereby obtained would provide the Bell companies with massive additional resources with which to fund competitively significant activity in the payphone markets in their respective regions. For example, the additional funds could be used to bid up location provider commissions to unparallelled levels, effectively foreclosing IPP providers from competing for profitable locations such as airports, hotels, etc.

If allowed to select the interLATA carriers serving their payphones, the Bell companies would also be able to exercise dominance of the interLATA 0+ market even though they may remain prohibited from directly providing interLATA 0+ services. In addition, a Bell company that sought and obtained a large share of an interLATA carrier's 0+ revenue could effectively acquire a

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Agric. Export Assn. v. Sunkist Growers, 526 F.2d 1196 (9th Cir. 1975), cert. denied, 425 U.S. 959 (1976) (45-70%); Energez Lighting Indus. v. North Am Phillips Lighting Corp., 656 F. Supp. 914 (S.D.N.Y. 1987) (25%).

[35] Bell attempts to enhance their power in the market are not fanciful. Indeed, it was recently reported that SBC, Pacific Bell, and BellSouth were looking to "pooling buying power" to form a "buying club of sorts" to negotiate with long distance carriers. "BellSouth, Pacific Bell, and SBC Considering Joining Long Distance Buying," Communications Daily, Vol. 16, No. 87 (May 3, 1996).

stake in the success of that carrier. The presubscribed carrier could effectively become a proxy for the Bell company to engage in prohibited interLATA activity.

In the event that the Commission decides that it is in the public interest to allow inter-LATA carrier selection by the BOCs, the Commission must adopt strong safeguards to limit the Bell companies ability to use those selection rights to further increase their dominance of the payphone market. The effects described above can be ameliorated by several steps. First, the Commission should limit the amount of interLATA traffic that a BOC can deliver to any one IXC. This limit would take the form of a restriction on the number of minutes of traffic or the number of calls that could be delivered to the carrier, the number of payphones for which the carrier could be the presubcribed OSP, etc. The BOCs would be required to put in their contracts with the IXCs a provision that required the IXC to pay any aggregation of non-BOC PSPs providing the same level of traffic (or number of payphones, etc.) the same commission levels as the BOC is receiving. The limit on the amount of traffic that could be delivered to one IXC by the BOC in a region would be set at a level that allowed at least three aggregations of IPPs within the BOCs region to reach the trigger level of traffic (or payphones, etc.) necessary to receive from the IXC the commission level being paid to the BOC.[36]

[36] Thus the limit on the amount of traffic would vary from region to region and change over time based on the BOC share of the market. For example, suppose a BOC had 58% of the market within its region. In order to allow at least three "aggregations" of IPP providers to reach the highest level of commissions by dividing up the remaining 42% of the market, the limit on traffic that the BOC could deliver to any one IXC would be 14%. If the BOC in another region had 52% of the market, it would be able to deliver a higher percentage of traffic, up to 16% of its traffic, to any one IXC, reflecting the less concentrated state of the market in its region. As a BOC's market share and dominance declined, the BOC could deliver more and more traffic to any one IXC.